

Comments on Mobile Spectrum Holdings

**Federal Communications Commission
WT Docket No. 12-269**



**Communications
Liberty *and*
Innovation Project**

The Communications Liberty and Innovation Project¹ (CLIP) submits these comments in response to the Notice of Proposed Rulemaking regarding mobile spectrum holdings released on September 28, 2012.²

I. The FCC should not alter its framework for analyzing spectrum aggregation during its review of a particular transaction or license application.

The framework for analyzing mobile spectrum aggregation adopted by the Federal Communications Commission (FCC) in 2004³ remains analytically sound. The framework unraveled when the FCC began altering it in the midst of ongoing transaction and licensing proceedings. A stable regulatory environment encourages voluntary market participation and discourages strategic manipulation. Recent FCC decisions have destabilized the regulatory environment and created additional uncertainty in the secondary markets and FCC auctions. This uncertainty harms consumers and benefits no one but rent seekers. Whatever spectrum aggregation framework the FCC adopts in this proceeding, it should not alter that framework during review of a particular transaction or license application. If the FCC believes its framework should be revised, it should limit any such revisions to rulemaking proceedings in which the public has an opportunity to comment and the resulting decision is subject to judicial review.

¹ The [Communications Liberty and Innovation Project](#) (CLIP) is a project of the [Competitive Enterprise Institute](#). CLIP supports 21st Century policies that promote boundless innovation, private investment, and sustainable economic growth through free markets and entrepreneurship in America's technology industries.

² Policies Regarding Mobile Spectrum Holdings, *Notice of Proposed Rulemaking*, FCC 12-119 (2012) (*Mobile Spectrum NPRM*).

³ See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion and Order*, FCC 04-255 (Oct. 26, 2004) (*AT&T-Cingular*).

When the FCC adopted its current approach to reviewing mobile spectrum aggregation, it acknowledged that both a strict limit on spectrum aggregation (also known as a cap) and case-by-case review offer certain advantages.⁴ A strict limit offers greater certainty and the expenditure of fewer industry and agency resources, whereas case-by-case review offers greater flexibility and consideration of the actual circumstances of a particular transaction.⁵ The 2004 framework was designed to maximize the advantages of both approaches by providing the agency with additional flexibility while providing the public with enough certainty to structure transactions in accordance with regulatory requirements.⁶

The FCC recognized that, without objective guidelines or established precedent to guide case-by-case review, the FCC would be unable to produce accurate and consistent results on a timely basis.⁷ To avoid these disadvantages, the FCC committed to provide the public with “a reasonable degree of certainty and transparency” regarding transactions the FCC would likely consider to be in the public interest.⁸ The FCC indicated it would consider the most appropriate process for developing guidelines case-by-care review, including notice and comment procedures, as well as substantive benchmarks.⁹

In practice, the FCC has not met its commitment to provide the public with a reasonable degree of certainty and transparency. The FCC has never specified an appropriate process for developing or altering guidelines for the review of spectrum aggregation and has routinely

⁴ See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, FCC 01-328 ¶ 4 (Dec. 18, 2001) (*Second Biennial Review Order*).

⁵ See *id.*

⁶ See *id.* at ¶ 4, 56-57.

⁷ See *id.* at ¶ 57.

⁸ See *id.* at ¶¶ 50, 56.

⁹ See *id.* at ¶ 58.

refused to adhere to the requirements of its framework established by previous precedent. In the last four years, the FCC has substantially altered the framework for analyzing spectrum aggregation many times.

- In 2008, the FCC applied its spectrum aggregation analysis to mobile spectrum acquired in Auction 73 *after* the auction was complete.¹⁰ In 2001, the FCC had stated it would consider spectrum aggregation in a service rules proceeding *before* it conducts an auction.¹¹
- In 2011, an FCC staff analysis presumed spectrum aggregation had the potential to cause harm because the spectrum screen triggered an unprecedented number of markets, but did not establish a benchmark that would trigger this presumption.¹² In 2007, the FCC had stated the spectrum screen “is designed to be conservative” and that the FCC must conduct a granular analysis of *each* market triggered by the screen to determine whether “harm is in fact likely.”¹³
- In 2011, the FCC evaluated spectrum aggregation at the national level measured on a MHz*POPs basis, but did not establish a benchmark.¹⁴ This measurement appears to have replaced the presumption in the *Staff Analysis*.

¹⁰ See Union Telephone Company, Cellco Partnership d/b/a Verizon Wireless, *Memorandum Opinion and Order*, FCC 08-257 ¶ 9 (Nov. 13, 2008) (*Verizon Wireless-Union Tel. Order*).

¹¹ See *Second Biennial Review Order* at ¶ 54.

¹² See Staff Analysis and Findings, WT Docket No. 11-65 ¶¶ 45-47 (Nov. 29, 2011) (*Staff Analysis*).

¹³ See Applications of AT&T Inc. and Dobson Communications Corporation, *Memorandum Opinion and Order*, FCC 07-196 ¶¶ 30, 39 (Nov. 19, 2007) (*AT&T-Dobson*).

¹⁴ Application of AT&T Inc. and Qualcomm Incorporated, *Order*, FCC 11-188 ¶ 45 (Dec. 22, 2011) (*AT&T-Qualcomm*).

- In 2011, the FCC separately analyzed spectrum aggregation below 1 gigahertz, but did not establish a benchmark.¹⁵ The FCC had not differentiated between spectrum above and spectrum below 1 GHz in its previous transaction reviews.¹⁶
- In 2012, the FCC altered the framework again by calculating nationwide spectrum holdings using a population-weighted average megahertz, but did not establish a benchmark.¹⁷
- In 2012, the FCC also eliminated the spectrum aggregation “safe harbor.”¹⁸

None of these changes were related to the *application* of the established framework to the actual facts of these particular transactions: These changes substantially altered the *framework itself* without providing any practical guidance regarding the level of spectrum aggregation the FCC would consider permissible.

The advantages of strict spectrum aggregation limits are lost entirely when the FCC alters its analytical framework during a particular transaction or licensing proceeding. Changing the framework on case-by-case basis creates uncertainty and inequity, lacks transparency, causes administrative delay, promotes rent seeking, enables the abuse of agency authority, and reduces auction efficiency – all of which harms consumers by discouraging investment in mobile infrastructure and services.

¹⁵ See *id.* at ¶ 49 (Dec. 22, 2011).

¹⁶ See *AT&T-Cingular* at ¶ 81.

¹⁷ See Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC, *Memorandum Opinion and Order and Declaratory Ruling*, FCC 12-95 ¶ 77 (Aug. 23, 2012) (*Verizon Wireless-SpectrumCo*).

¹⁸ See *id.* at ¶ 48.

It offends basic principles of equity and good government for the FCC to substantially alter its rules without notice. The public cannot reasonably predict potential changes the FCC might make to its analytical framework during the review of a particular transaction or license application. When parties are negotiating secondary market transactions or bidding on licenses during an auction, they should be able to assume the established framework will apply. When parties cannot rely on the stability of FCC rules, their negotiations must account for substantial uncertainty, which chills investment and stalls transactions that would benefit consumers. In the auctions context, potential bidders may discount their bids, which reduces auction efficiency revenue for the Treasury.

Parties who nevertheless decide to risk FCC review are often caught between the *Scylla* and the *Charybdis*. When the FCC commences its review, the applicants have already expended significant resources and committed substantial capital (often amounting to billions of dollars) in reliance on the existing framework. As a practical matter, applicants in this position are often forced to “voluntarily” accept FCC transaction decisions or abandon their applications. Both options often entail significant costs, and no matter which option the applicants choose, they will lack standing to seek judicial review. As a result, the FCC has virtually unchecked power to dictate the terms of secondary market transactions and licenses won at auction.

The FCC’s frequent exercise of this power substantially increases the risk of administrative delay and rent seeking in licensing and transaction proceedings. Competitors have incentives to file pleadings to delay an FCC decision or harm the competitive position of the applicants. Competitors and other industry participants also have incentives to seek changes that might result in FCC conditions or mandatory spectrum divestitures that improve their competitive position or allow them to profit from the investments of the applicants. By signaling

its willingness to consider altering its rules during case-by-case review, the FCC *encourages* the filing of such pleadings. Even worse, the FCC has demonstrated a tendency to reward these rent seeking efforts.

These problems are not impossible to solve. The FCC could provide a reasonable degree of certainty to the public while retaining decisional flexibility, *if* the FCC refuses to change its regulatory framework in a particular transaction or licensing proceeding. Such changes should be made only in rulemaking proceedings subject to a vote of the full Commission and meaningful judicial review. The result would be a more stable regulatory environment that benefits consumers, not competitors.

II. The FCC should establish a spectrum aggregation benchmark equal to one-third of mobile spectrum.

The primary goal of FCC limits on spectrum aggregation is the prevention of anticompetitive behavior.¹⁹ If a mobile provider were allowed to aggregate large amounts of spectrum, it might be able to exert undue market power or inhibit entry.²⁰ The statutory scheme, FCC precedent, and judicial precedent all indicate that a mobile provider that holds less than one-third of mobile spectrum cannot unilaterally or in combination exclude efficient competitors, reduce the quantity or quality of services provided, or increase prices to the detriment of consumers. Whether it is considered a strict limit or merely a safe harbor, the FCC should establish a spectrum aggregation benchmark equal to one-third of mobile spectrum.

¹⁹ See, e.g., *Second Biennial Review Order* at ¶ 26 (stating that goal of the 1994 spectrum cap was to “discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency”).

²⁰ See *Mobile Spectrum NPRM* at ¶ 7.

A. A safe harbor is necessary to provide the public with a reasonable degree of regulatory certainty.

At a minimum, this benchmark should be a “safe harbor.” The FCC has historically limited spectrum application through “caps” or “screens.” Caps are strict benchmarks on the amount of spectrum a licensee could hold, whereas screens provide the FCC with flexibility to permit licensees to exceed the benchmark. Until recently, however, *both* have been treated as safe harbors. A safe harbor is necessary to provide the public with a reasonable degree of certainty regarding the level of spectrum aggregation the FCC is willing to permit. Spectrum planning, secondary market negotiations, and the development of new mobile technologies require substantial investments of human and financial capital. The additional certainty provided by a safe harbor would benefit consumers by encouraging investment, market participation, and competition.

B. A benchmark equal to one-third of mobile spectrum would continue to prevent anticompetitive behavior.

A benchmark equivalent to approximately one-third of mobile spectrum would meet the goal of preventing anticompetitive behavior based on spectrum aggregation while promoting continued innovation, investment, and spectrum efficiency.

A one-third benchmark is also consistent with the statutory scheme. Section 332(c)(1)(C) of the Communications Act requires the FCC to review competitive market conditions with respect to commercial mobile services on an annual basis and issue a report analyzing “whether or not there is effective competition.”²¹ Although Section 332 does not define “effective competition,” it is presumed that “[a] term appearing in several places in a statutory text is

²¹ See 47 U.S.C. § 332(c)(1)(C).

generally read the same way each time it appears.”²² The term “effective competition” also appears in 47 U.S.C. § 543, which exempts cable systems that are subject to “effective competition” from rate regulation. This section deems a cable system subject to “effective competition” if there are two other competitors in the market.²³ Congress has thus indicated that three competitors are sufficient to constrain anticompetitive behavior in communications markets.

FCC and judicial precedent also support this view. In *Cincinnati Bell Telephone Co. v. FCC*,²⁴ the Sixth Circuit remanded the FCC’s cellular/PCS cross-ownership rule and the attribution rules for cellular licensees because the FCC had not presented any economic evidence justifying them. The FCC believed it was “common sense” that an entity with at least a twenty percent interest in a cellular provider would not compete with that cellular provider as a PCS licensee.²⁵ According to the court, the “only rational conclusion – given the high cost of obtaining a [PCS] license, the strict build-out requirements for licensees, and the existence of at least two other large [PCS] providers in each market [*i.e., a market with three total competitors*] – is that a business competing at a less than efficient level will soon be driven out of the marketplace.”²⁶

The court also rejected the FCC’s argument that the restrictions were necessary to avoid excessive concentration of licenses and promote competition.

While avoiding excessive concentration of licenses certainly is a permissible goal under the Communications Act, simply precluding a class of potential licensees

²² See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

²³ See 47 U.S.C. § 543(l)(1). The non-cable competitors must also meet certain deployment and subscription benchmarks that are irrelevant to an analysis of spectrum aggregation.

²⁴ See *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

²⁵ See *id.* at 760.

²⁶ See *id.*

from obtaining licenses (without a supported economic justification for doing so) solves the problem arbitrarily. The FCC must supply a reasoned basis for its decision. The need to avoid “excessive concentration of licenses” does not provide the requisite “reasoned basis.” Without any economic rationale, the Cellular eligibility rules are nothing more than an arbitrary regulation of who may bid on which Personal Communications Service licenses.²⁷

The court held that findings that the market is “less than optimally competitive” and “broadly stated fears” are not enough to justify restrictions that “have such a profound effect on the ability of businesses to compete in the twenty-first century technology of wireless communications.”²⁸

After conducting an economic analysis of spectrum aggregation limits on remand, the FCC determined that the overall spectrum cap applicable at the time adequately addressed anticompetitive behavior and that the PCS and cellular/PCS spectrum caps that had been remanded by the Sixth Circuit were no longer necessary.²⁹

Since 2004, the FCC’s benchmarks for the spectrum screen have equaled approximately one-third of mobile spectrum. There is no evidence that this spectrum aggregation benchmark has resulted in anticompetitive behavior. During the last six years – mobile prices have dropped, coverage has expanded, and service providers have invested in new technologies. This evidence indicates that the one-third benchmark meets the goals of FCC limitations on spectrum aggregation and will continue to do so going forward.

C. The FCC should retain the flexibility to allow providers to reasonably exceed the one-third benchmark.

Although there are advantages to strict limitations, there are also advantages to retaining

²⁷ *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d at 764 (citations omitted).

²⁸ *See id.* at 763-64.

²⁹ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278 ¶ (Jun. 24, 1996).

the flexibility to allow providers to reasonably exceed a spectrum aggregation benchmark (so long as the FCC does not abuse this flexibility by altering its analytical framework). A strict limit could reduce the efficiency of some 4G deployments by forcing licensees to deploy non-standard channel sizes or strand small, non-contiguous portions of spectrum in an effort to comply with a cap. It would not serve the public interest to provide an incentive for licensees to forgo more efficient deployment strategies because the available spectrum would cause them to exceed a cap by a reasonable amount. Consumers would be better served if the FCC had the ability to approve beneficial transactions exceeding the benchmark that do not pose a risk of anticompetitive behavior.³⁰

D. The FCC should apply the one-third benchmark on a local basis only.

Although the FCC has considered spectrum aggregation issues on a nationwide basis in recent transactions, it has not provided any rationale for this approach. If no licensee holds substantially more than one-third of mobile spectrum in any local market, no licensee will be able to act anticompetitively due to its spectrum holdings. The two nationwide measurements proposed by the FCC – MHz*POPS and population-weighted average megahertz – are irrelevant to a spectrum aggregation analysis. At best, these measurements are a very rough proxy for national economies of scale. When such proxies are analyzed at the national level, they are too rough to enhance the local analysis.

Though they would provide no additional value, these nationwide measurements would result in harmful unintended consequences. A nationwide cap would give nationwide providers

³⁰ To provide additional certainty to potential licensees, the FCC could specify a permissible margin of error.

an incentive to cease providing service and relinquish spectrum in areas that are costly to serve or in which they have relatively low market share. The result would be less competition, not more.

III. The FCC should include all spectrum that is suitable for mobile service in the one-third benchmark.

When it calculates the one-third benchmark, the FCC should include all spectrum that is suitable for mobile services in the numerator. The FCC has traditionally determined whether spectrum is suitable for mobile services by analyzing (1) the physical properties of the spectrum, (2) the state of equipment technology, (3) whether the spectrum is licensed with a mobile allocation and corresponding service rules, and (4) whether the spectrum is committed to another use that effectively precludes its uses for mobile services.³¹ As applied, this test has failed to include all spectrum that is currently used to compete in the mobile market. To the extent the FCC lacked adequate data to apply this test in past transactions, the FCC should obtain such data in this proceeding and conduct a more thorough analysis.

Technology and regulatory changes have also rendered the test outdated to the extent it relies on licensed mobile allocations and service rules. Unlicensed spectrum is now playing a substantial role in the mobile market and unlicensed hotspots will likely be integrated into future mobile networks. The FCC has also shown a willingness to waive the allocation requirement and authorize extensive mobile networks in spectrum that lacks a mobile allocation. The FCC should revise its suitability test accordingly to ensure that all spectrum that is actually used to provide mobile services and compete in the mobile market is included in its spectrum aggregation analyses.

³¹ See *AT&T-Qualcomm* at ¶ 38.

IV. The FCC should not make distinctions among mobile spectrum bands.

The FCC should return to its historical practice of avoiding distinctions among different spectrum bands when considering spectrum aggregation. As a practical matter, it is unlikely that the FCC would be able to adjust its determinations regarding such distinctions as quickly as the market. At one time, bands above 2 GHz were thought to be unsuitable for mobile use. Yet the 2.6 GHz band is now considered an essential band for LTE deployment worldwide due to its significant contiguous bandwidth and its economies of scale (it is one of the few LTE bands that enjoys significant global harmonization). The market for spectrum inherently accounts for differences in the characteristics of different bands through many mechanisms, including lower prices at auction and in the secondary markets, and can adjust to market changes far more quickly than FCC. The public interest would be best served by continuing to rely on technological innovation and market forces to maximize the potential benefits of different spectrum bands.

If the FCC nevertheless intends to second-guess these market mechanisms, it would need to obtain sufficient facts and data to accurately assess the potential impact of distinctions among different spectrum bands on competition (i.e., the FCC would need to determine whether such distinctions are competitively relevant). At a minimum, such a determination would require that the FCC address the following questions:

- What is the total coverage and density of macro cell, small cell, and indoor cell deployment in each licensed band by each mobile licensee?
- What is the total coverage and density of indoor and outdoor Wi-Fi deployment in each unlicensed band by each mobile licensee?
- What are the average and mean cell sizes in each licensed band by each mobile licensee measured by CMA, RSA, and nationwide?
- Are indoor cells and Wi-Fi offloading reasonable alternatives to low-frequency spectrum

for indoor penetration?

- How much contiguous spectrum is available in each licensed band?
- What is the average contiguous bandwidth by each mobile licensee?
- How does contiguous spectrum impact competition?
- How does channel bonding impact competition?
- Which mobile bands in the U.S. are harmonized globally and to what extent?
- How does international harmonization impact competition?
- How do factors other than their inherent characteristics and international harmonization affect deployment decisions in each band, including business models, management decisions, debt loads, access to capital, and FCC roaming rules?

Once the FCC collects this data, it should provide an opportunity for public comment and economic analysis.

The FCC would also need to consider regulatory alternatives. For example, to the extent a particular band is less suitable for mobile use due to outdated or unnecessary FCC policies, the FCC should consider altering those policies directly. Compensating for outdated and unnecessary FCC policies indirectly through limits on spectrum aggregation would have the perverse effect of limiting the incentive of the FCC to reform existing policies. Direct regulatory reforms would do more to promote competition and the public interest than adopting spectrum aggregation limits.

Respectfully submitted,

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November 28, 2012